

**Objection to the Issuance of Marketing and Distribution Permit
No. IN LA 000819 and Public Notice 13-03-C-PI to
Greentree Enterprises, LLC
Gary, Lake County, Indiana
2014 OEA 8, (13-S-J-4650)**

OFFICIAL SHORT CITATION NAME: When referring to 2014 OEA 8 cite this case as
Greentree Enterprises, LLC, 2014 OEA 8.

TOPICS:

infer
email notice
timely filed
Motion to Dismiss
subject matter jurisdiction
germane to calculating service
Deadline stated in IDEM's Public Notice
I.C. § 4-21.5-3-2(e)
I.C. § 4-21.5-3-7(a)(3)(A)
I.C. § 13-15-6-1(a)
I.C. § 13-15-6-7(c)(1), (2)

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

Petitioner:	Patrick Lyp, Esq.; Blachy Tabor Bozik & Hartman, LLC Frank J. Deveau, Esq., Michael D. Chambers, Esq., Melissa A. Gardner, Esq.: Taft Stettinius & Hollister, LLP
Respondent/Permittee:	David W. Westland, Esq.; Westland Kramer & Bennett, PC
IDEM:	April D. Lashbrook, Esq.

ORDER ISSUED:

March 7, 2014

INDEX CATEGORY:

Land

FURTHER CASE ACTIVITY:

[none]

STATE OF INDIANA)
)
COUNTY OF MARION)

BEFORE THE INDIANA OFFICE OF
ENVIRONMENTAL ADJUDICATION

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER OF DISMISSAL

FINDINGS OF FACT

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2. The March 19, 2013 Permit stated that a party challenging IDEM's Permit decision needed to file its Petition for Administrative Review "within eighteen days of the date of this notice." *IDEM's December 2, 2013 Motion to Dismiss, Ex. 1, pp. 13, 14.* The March 19, 2013 Public Notice stated "Date Appeals Due: April 10, 2013."
3. The parties do not dispute that IDEM did not serve the Permit by mail to Petitioner Gary Airport. Petitioner Gary Airport (its legal counsel) received notice of the Permit via a March 27, 2013, 4:31 PM email from City of Gary representatives, who stated, "We have until April 10, 2013 to challenge the decision, IC 13-15-5-1 and IC 4-21.5-3-7 – Administrative Review. See attachment (Public Notice) on how to file." *Petitioner Gary Airport's December 23, 2013 Response, Exs. A, B.*
4. On April 10, 2013, Petitioner Gary/Chicago International Airport Authority ("Petitioner" or "Gary Airport") filed its Petition for Administrative Review.
5. IDEM's December 2, 2013 Motion to Dismiss challenged whether the Court had subject matter jurisdiction in this case, based on the assertion that the April 10, 2013 Petition for Administrative Review was not timely filed. On December 4, 2014, Permittee/Respondent Greentree joined in IDEM's Motion to Dismiss. On December 9, 2013, IDEM withdrew its Motion to Dismiss, acknowledging its discovery that the Public Notice listed the petition filing deadline as April 10, 2013. Petitioner Gary Airport responded in opposition to dismissal on December 23, 2013. In response to informal inquiries from Court staff as to how the parties wanted to proceed in light of IDEM's December 9, 2013 Motion withdrawal, Permittee Greentree filed a February 7, 2014 Motion for Ruling on its Motion to Dismiss.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is authorized to implement and enforce specified Indiana environmental laws, and relevant rules, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication ("OEA" or "Court") has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy, per I.C. § 4-21.5-7, *et seq.*, and I.C. § 4-21.5-3-7(a)(1)(A). Matters before OEA are subject to procedures stated in I.C. § 4-21.5-3, *et seq.* and 315 IAC 1, *et seq.*
2. This is a Final Order pursuant to I.C. § 4-21.5-3-23, I.C. § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as Conclusions of Law, or Conclusions of Law that may be construed as Findings of Fact, are so deemed.

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3. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. I.C. § 4-21.5-3-27(d); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005). "De novo review" means that "all issues are to be determined anew, based solely upon the evidence adduced at the hearing and independent of any previous findings." *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247 (Ind. Ct. App. 1981).
4. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. 4-21.5-3-27(d). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *Gas America* 347, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF #9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc.*, 2005 OEA 26,41.
5. In this case, Permittee Greentree seeks dismissal of Gary Airport's Petition as untimely filed. Motions to dismiss generally test the legal sufficiency of a claim, not the facts supporting it. *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind.Ct.App. 2003). When ruling on a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). Determinations considering facts beyond the complaint are treated by the court as a motion for summary judgment. *Id.* Whether on a motion to dismiss or on summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007).
6. The timely filing of a notice of appeal is a jurisdictional prerequisite. *Tarrance v. State*, 947 N.E.2d 494 (Ind. Ct. App. 2011). This court lacks subject matter jurisdiction over appeals that are not timely initiated, and subject matter jurisdiction cannot be waived. *Id.*; *Marlett v. State*, 878 N.E.2d 860, 864 (Ind. Ct. App. 2007), *trans. denied*; *see also Jernigan v. State*, 894 N.E.2d 1044, 1047 (Ind. Ct. App. 2008) (noting that "courts at all levels are required to consider the issue [of subject matter jurisdiction] *sua sponte*"). Failure to timely file a petition for administrative review denies OEA any discretion to acquire jurisdiction over a petition for administrative review which is filed after the deadlines mandated by statute. *See*

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In re: Singh, 2009 OEA 62; *In Re: Variance for Open Burning Herring*, 2008 OEA 7; *In re: Murphy Oil USA, Inc.*, 2004 OEA 51, 55; *In Re: Suverkup, Benzol Cleaning Co.*, 2004 OEA 48.

7. I.C. § 4-21.5-3-7(a)(3)(A) states that a Petition for Review must be filed within fifteen (15) days after the person is given notice of the order, or any longer period set by statute. I.C. § 13-15-6-1(a) states that “[n]ot later than fifteen (15) days after being served the notice provided by the commissioner ... any other person aggrieved by the commissioner’s action may appeal the commissioner’s action to the office of environmental adjudication.” I.C. § 13-15-6-7(c)(1), (2) bases these calculations on the earlier of when the person is either personally served, or when the notice for the person is deposited in the mail. I.C. § 4-21.5-3-2(e) provides that three (3) days shall be added to this deadline if service is by mail. I.C. § 4-21.5-3-2(a), (b) provides that if the last day of a computed period is . . . a Saturday, Sunday, or legal holiday,” then the computed period runs until the end of the next day after the Saturday, Sunday or legal holiday.
8. The calculation for the timely filing of a Petition for Administrative Review of an IDEM Permit mailed on March 19, 2013 is: fifteen (15) days (I.C. § 4-21.5-3-7(a)(3)(A) and I.C. § 13-15-6-1(a)) plus three (3) days for mailing (I.C. § 4-21.5-3-2(e), or April 6, 2013. As April 6, 2013 was a Saturday, then the deadline is extended to Monday, April 8, 2013.
9. Per statute, Petitioner Gary Airport’s April 10, 2013 Petition for Administrative Review was filed after the April 8, 2013 deadline mandated by statute, and is thus untimely filed.
10. Petitioner Gary Airport argues that its April 10, 2013 Petition is timely filed on the basis that the Permit was never served by mail on Petitioner Gary Airport. “Therefore, because Gary Airport was never actually served with notice, Gary Airport’s clock to appeal the Permit technically has not even begun ticking.” However, Petitioner Gary Airport has not provided legal authority¹ showing that IDEM was required to serve Gary Airport by mail. The Court declines to agree with a technical argument which could extinguish any limitation of action for IDEM permit appeals.
11. Petitioner Gary Airport further argues that its April 10, 2013 Petition is timely filed, on the basis that it appealed within the statutory deadline after it obtained actual notice. In its December 23, 2013 Response, Petitioner Gary Airport argues that if it was notified in a March 27, 2013 email from the City of Gary, then it is reasonable to presume that the City of Gary was served notice of the Permit on March 26, 2013, but was not served on March 19, 2013. Therefore, Petitioner Gary Airport’s April 10, 2013 Petition would be timely filed.

¹IDEM is bound by numerous rules which expressly specify whom it is to serve for particular types of permits. The parties do not assert that Gary Airport was required to be served by mail for this Permit.

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12. Petitioner Gary Airport cites in support this Court's decision in *In re: Elson's Land Corp.*, 2011 OEA 58. In *Elson's Land Corp.*, this Court held that an unrepresented citizen's letter in opposition to a permit (also appealed by the Permittee) was timely filed, but was otherwise dismissed for the citizen petitioner's failure to comport his petition to content required by statute and for failure to attend court proceedings. *Id.* The citizen petitioner, Mr. Smith, had stated on his initial letter that he received notice of the contested permit on December 1, and appealed it on December 9 (the permit was issued on November 10). *Id.* The only evidence in support of the contention that Mr. Smith was served on November 10 was a statement in argument from Permittee's legal counsel; IDEM mailing records were not clear, and Mr. Smith did not respond in substance to establish whether he was entitled to service. *Id.* "And, the Court's role as fact-finder excludes its ability to serve as investigator to determine when the Permit was sent to Woodrow Smith. The Court was presented with no further evidence as to the date when Woodrow Smith received notice of the IDEM action he challenged. This Court is required to take as true all allegations on the face of the complaint, and draw all reasonable inferences in favor of the non-moving party, Woodrow Smith. Thus, Woodrow Smith's December 9, 2010 letter provides substantial evidence that he received notice of the Permit on December 1." *Id.* at 67. The December 1 date was on the face of the December 9 complaint.
13. Reasonable inferences must be considered to support whether Petitioner Gary Airport timely filed, based on actual notice. Petitioner Gary Airport does not establish its relationship to City of Gary, but it is reasonable to infer from Petitioner Gary Airport's argument on actual notice that City of Gary was a party which IDEM was required to serve, which IDEM did serve, and who is sufficiently interrelated to Gary Airport such that service on the City would be germane to calculating service on the Airport.
14. Petitioner Gary Airport further argues that City of Gary was not served on March 19, 2013, but was served on March 26, 2013. The Court assumes that it is to infer that City of Gary notified Petitioner Gary Airport the day after it was served notice of the Permit. The March 26, 2013 date is not on the complaint. As in *Elson's Land Corp.*, the Court would exceed its role as fact-finder if it were to determine substantial evidence on the face of the complaint, in evidence before the court, or in reasonable inference, established that the City of Gary was not served on March 19, 2013, on the basis that the City of Gary emailed the Gary Airport (its legal counsel) the day after it was served.
15. Petitioner Gary Airport also argues that its Petition was timely filed within the deadline stated in IDEM's Public Notice. While strongly compelled by this argument, such a decision would require the Court to exercise discretion it is expressly denied by legal authority. And, the Public Notice from IDEM, and the email notice from City of Gary to Gary Airport, both contained accurate statute citations which directed Gary Airport's recipient of the notice (its legal counsel) to calculate whether IDEM's deadline calculation was accurate. Failure to timely file a petition for administrative review denies OEA any discretion to acquire jurisdiction over a petition for administrative review which is filed after the deadlines

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mandated by statute. *See In re: Singh*, 2009 OEA 62; *In Re: Variance for Open Burning Herring*, 2008 OEA 7; *In re: Murphy Oil USA, Inc.*, 2004 OEA 51, 55; *In Re: Suverkup, Benzol Cleaning Co.*, 2004 OEA 48.

16. Petitioner Gary Airport's April 10, 2013 Petition for Administrative Review of IDEM's March 19, 2013 Permit was not timely filed. For lack of subject matter jurisdiction arising from a timely-filed Petition, this matter must be dismissed.

FINAL ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Permittee/Respondent, Greentree Enterprises, LLC #2's Motion to Dismiss, is **GRANTED**. Petitioner Gary/Chicago International Airport Authority's Petition for Administrative Review of the Indiana Department of Environmental Management's issuance of Marketing and Distribution Permit No. IN LA 000819 and Public Notice 13-03-C-PI issued to Greentree Enterprises, LLC #2, is **DENIED**.

You are hereby further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 7th day of March, 2014 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge